86-1063

No.

IN THE

Supreme Court of the United States

October Term, 1986

JEFFREY K. RAFSKY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

The Third Circuit's holding that a "scheme to defraud" is sufficiently proven through evidence of the deposit of checks not backed by sufficient funds and the subsequent withdrawal of funds created by the artificial float renders this Court's decision in *Williams v. United States*, 458 U.S. 279 (1982), meaningless. Its holding that a "scheme to defraud" within the meaning of the mail and wire fraud statutes need not be executed by means of misrepresentations also represents a vast and unwarranted expansion of the scope of those two fundamental criminal statutes. It conflicts with decisions of the Sixth and Seventh Circuits and imports an intolerable element of uncertainty into the Racketeer Influenced and Corrupt Organizations Act, since violations of the mail fraud and wire fraud statutes serve as predicate acts for criminal prosecution or civil recovery under RICO. Therefore, the questions presented for review by this Court are the following:

1. Whether this Court's decision in *Williams v. United States* precludes prosecution under the wire fraud statute, 18 U.S.C. §1343, where the only evidence to prove a "scheme to defraud" is the deposit of checks not backed by sufficient funds and the subsequent withdrawal of funds created by the artificially inflated balance.

2. Whether a conviction under the "scheme to defraud" clause of the wire fraud statute is proper without proof of either a false representation or a deceitful omission.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Jeffrey K. Rafsky respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this matter on October 14, 1986.

OPINIONS BELOW

The October 14, 1986, Opinion of the United States Court of Appeals for the Third Circuit is reported at 803 F.2d 105 (3d Cir. 1986), and is reproduced in the Appendix at A-1 through A-9.

JURISDICTION

The judgment of the Court of Appeals was entered on October 14, 1986 (App. at A-10) and this petition was filed within 60 days of that date. The statutory provision which confers jurisdiction on this Court to review the judgment of the Court of Appeals by Writ of Certiorari is 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

The wire fraud statute, 18 U.S.C. §1343, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The mail fraud statute, 18 U.S.C. §1341, which serves as a model for the construction of the wire fraud statute, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, . . . shall be fined not more than $1,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

Like *Williams* v. *United States*, 458 U.S. 279 (1982), this case involves the deposit of checks backed by insufficient funds and the subsequent use of proceeds generated as a result of the

artificially inflated balance. Petitioner Jeffrey K. Rafsky was the president of The Trend Group Ltd. (hereinafter "Trend"), a holding company for, *inter alia*, its subsidiary corporation Lease Trend Company (hereinafter "LTC") (App. at A-2). Trend long maintained a checking account at Citizens Fidelity Bank and Trust Company (hereinafter "Citizens"), and LTC long maintained a checking account at Provident National Bank (hereinafter "Provident"). *Id*. From September 1983 through February 1984, Trend wrote checks drawn on the Citizens account and deposited them into LTC's Provident account. Many of the Citizens checks, however, were not backed by sufficient funds at the time of deposit (App. at A-3).

By virtue of agreements with Provident,[1] LTC was given immediate access to funds available from the Citizens checks (and all other checks) at the moment of deposit, and LTC was permitted to wire funds from its account to the extent of its balance. *Id*. The balance was computed by Provident to include a sum equal to the face amount of, *inter alia*, deposited but uncleared Citizens checks. During the time in question, LTC wired money from the Provident account both to pay creditors and to cover Citizens checks presented for payment.[2] In mid-February 1984, Provident suspended LTC's wire transfer privileges. Citizens checks deposited at Provident prior to the suspension of wire transfer privileges were subsequently returned for insufficient funds, leading to the creation of an overdraft in the Provident account of approximately 2.8 million

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1. LTC entered into the two agreements with Provident long before the alleged scheme. The first agreement gave LTC access to money at the time checks were deposited into the Provident account, regardless of the "clearing time" typically associated with such checks. The second agreement granted LTC wire transfer privileges from its checking account. The government never contended that the agreements were a part of the alleged scheme.

2. The government's proof concerning the availability of third-party funds from Provident was unclear at best. Substantial third-party funds were undoubtedly present in the Provident account and available at the time of payment of the Citizens checks at least until some time in January 1984, after which it was probably necessary to deposit additional Citizens checks to cover the checks presented by Provident to Citizens for payment.

dollars.[3] *Id*. A thirty-two count indictment alleging a "scheme to defraud" under the wire fraud statute, 18 U.S.C §1343, ensued.[4]

Following his conviction, Rafsky argued vehemently before the Third Circuit that the government's indictment and subsequent proof at trial were fatally flawed inasmuch as the only evidence of the "scheme to defraud" was the deposit of the Citizens checks and the subsequent use of funds created from the artificial float.[5] The argument was premised upon this Court's pronouncement that: "[T]echnically speaking, a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false.' " *Williams*, 458 U.S. at 284. Rafsky contended that the jury, in order to find a "scheme to defraud" (a necessary element of the wire fraud statute) was required to assign a false or deceptive meaning to the act of depositing the Citizens checks at Provident. The Third Circuit rejected this argument by wrongly distinguishing *Williams*, holding that *Williams* "impl[ied] that a deliberate plan to deceive through submitting checks backed by insufficient funds is not the same sort of crime as merely passing a single bad check" (App. at A-5).

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3. The overdraft was immediately collateralized, and substantial repayment had occurred before trial.

4. What the government failed to allege in the indictment or prove at trial is even more significant than what it did prove. No allegations were made or evidence offered that Rafsky engaged in a conspiracy with Provident employees. No allegations were made or evidence offered that Rafsky sought to bribe Provident employees. No allegations were made or evidence offered that Rafsky requested Provident employees to delay the return of the Citizens checks not supported by sufficient funds. No allegations were made or evidence offered that Rafsky took any other action to induce the delay of the return of the overdrawn checks. No allegations were made or evidence offered that Rafsky represented that Trend and LTC were engaged in anything other than a legitimate parent and subsidiary relationship.

5. Perhaps recognizing the inherent problems created by the *Williams* decision, the government attempted to significantly change its theory of the scheme to defraud before the Third Circuit, contending that the scheme embraced matters beyond the deposit of the Citizens checks and subsequent wire transfers. The matters included within government's revised theory, of course, were neither alleged in the indictment nor argued before the jury to be a part of the scheme and, thus, were effectively ignored by the Third Circuit.

REASONS FOR GRANTING THE WRIT

The Third Circuit's holding that a "scheme to defraud" is sufficiently proven through evidence of the deposit of checks not backed by sufficient funds and the subsequent withdrawal of funds created by the artificial float renders this Court's decision in *Williams v. United States*, 458 U.S. 279 (1982), meaningless. Its holding that a "scheme to defraud" within the meaning of the mail and wire fraud statutes need not be executed by means of misrepresentations also represents a vast and unwarranted expansion of the scope of those two fundamental criminal statutes. It conflicts with decisions of the Sixth and Seventh Circuits and imports an intolerable element of uncertainty into the Racketeer Influenced and Corrupt Organizations Act, since violations of the mail fraud and wire fraud statutes serve as predicate acts for criminal prosecution or civil recovery under RICO.

1. The Third Circuit's Decision Conflicts With This Court's Decision In Williams v. United States

In *Williams v. United States*, 458 U.S. 279 (1982), this Court reversed a check-kiting conviction based upon 18 U.S.C. §1014, holding that the submission of checks backed by insufficient funds was neither a "false statement" nor "overvalued property or a security." 458 U.S at 284-85. This Court reasoned that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'." *Id* at 284. Although recognizing that its definition of a check was "concededly a technical one," *id* at 285, this Court nonetheless rejected the government's theory that the drawer of a check is generally understood to represent that he currently has funds on deposit sufficient to cover the face value of the check, concluding that such an expansive reading of §1014 should not be based upon "subjective and variable 'understandings'." *Id* at 286.[6]

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6. In this context, this Court reaffirmed an earlier admonition that where, *inter alia*, the legislative history of a criminal statute "fails to evidence congressional awareness of the statute's claimed scope," *id* at 290, this Court's usual approach will be to construe the statute narrowly. *Id*. This Court also emphasized that it would not permit the imposition of criminal sanctions in

Here, the government indicted and proved at trial a "scheme to defraud" predicated solely upon the deposit of Citizens checks backed by insufficient funds, and the subsequent use of those funds created by the artificial float. The government's theory and proof at trial required the jury to characterize the deposit of the Citizens checks as false, deceptive or fraudulent. Although Rafsky contended that *Williams* raised an insurmountable barrier to the government's method of proof of the scheme to defraud, the Third Circuit rejected the argument. The Court reasoned that *Williams* "draws a qualitative distinction between an individual bad check and 'a scheme to pass a number of bad checks' . . . implying that a deliberate plan to deceive through submitting checks backed by insufficient funds is not the same sort of crime as merely passing a single bad check" (App. at A-5).

The Third Circuit has wrongly interpreted this Court's holding in *Williams*. Although recognizing that the government did not indict in *Williams* on a scheme theory, 458 U.S. at 287, this Court did *not* hold in *Williams* that evidence of the deposit of checks backed by insufficient funds would properly serve as the basis for an indictment under a "scheme to defraud" theory. Such a reading of *Williams* would undermine the foundation upon which its holding rests, for *Williams* is based upon the idea that a check cannot be characterized as either "true" or "false." *Id* at 284. Thus a worthless check can serve neither as the evidentiary basis for a "false statement" under 18 U.S.C. §1014, *id* at 290, nor as a "misrepresentation" under 18 U.S.C. §1341. *United States v. Frankel*, 721 F.2d 917 (3d Cir. 1983). By the same logic, the deposit of checks backed by insufficient funds alone cannot serve as evidence of a "scheme to defraud" inasmuch as it would permit a factfinder to characterize a check as "false" if considered in the context of a fraudulent scheme, even though the same factfinder would be compelled to find the same

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NOTES *(Continued)*

Williams since " 'it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the' deposit of bad checks." *Id*.

check a nullity if viewed in the context of a "misrepresentation" or a "false statement." It offends simple notions of logic to prohibit the consideration of a worthless check as "false" but to permit it to be considered "fraudulent."

The Third Circuit's decision effectively renders this Court's holding in *Williams* meaningless. If this opinion is not corrected by this Court, criminal liability will be determined by the ability of the government to avoid the holding in *Williams* by classifying as a "scheme" the deposit of checks backed by insufficient funds, as opposed to a "false statement" or a "misrepresentation." An individual brought before a court of law will be adjudged guilty or not guilty not upon inquiry into the conduct alleged to have been committed, but upon the keen draftsmanship of the prosecutor's pen. Such a result introduces an arbitrary, capricious element into our system of criminal law, smacks of injustice, and cries out for intervention by this Court.

II. The Third Circuit's Holding That A "Scheme To Defraud" Need Not Be Executed By Means Of Fraudulent Misrepresentations Or Deceitful Omissions Conflicts With Decisions Of The Sixth And Seventh Circuits.

In affirming the conviction, the Third Circuit conceded that *Williams* would have precluded Rafsky's prosecution had the indictment been premised on a theory that passing bad checks was a misrepresentation within the meaning of the wire fraud statute (App. at A-6). However, the Third Circuit evaded the impact of this Court's holding in *Williams* by dissecting the wire fraud statute into two independent "clauses": a "misrepresentation" clause and a "scheme to defraud" clause (App. at A-6, A-7 & n.2). *Williams*, the Third Circuit held, does not preclude prosecution under the "scheme to defraud" clause because " 'a scheme to defraud' need not be executed by 'means of misrepresentations' " (App. at A-7).

The Third Circuit's holding that the government may indict as a "scheme to defraud" activities which involve no specific misrepresentation — either affirmative or by omission — represents a vast and unwarranted expansion of the scope of the mail and

wire fraud statutes. It is unsupported by the facts of the case law on which the Third Circuit relies and conflicts with decisions of the Sixth and Seventh Circuits. Resolution of this conflict by this Court would dispel a major uncertainty now surrounding two of the most significant federal criminal statutes. *See* J. Rakoff, *The Federal Mail Fraud Statute*, 18 Duquesne L. Rev. 771, 822 (1980). It would also clarify an important question arising under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq*. ("RICO"). Because violations of the mail fraud and wire fraud statutes serve as predicate acts for both the imposition of criminal liability and recovery of civil damages under RICO, the present uncertainty in the construction of the former statutes is imported wholesale into the latter.

Both the Sixth and Seventh Circuits have rejected the expansive reading of the mail and wire fraud statutes presently adopted by the Third Circuit. As the Sixth Circuit held in *United States v. Van Dyke*, 605 F.2d 220 (6th Cir.), *cert. denied*, 444 U.S. 994 (1979), a "scheme to defraud":

> must involve some sort of fraudulent misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension.

605 F.2d at 225. *See also Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984) citing *Van Dyke*, *supra* (affirming dismissal of RICO count in civil complaint on grounds that complaint failed to allege adequately the elements of a scheme to defraud, since plaintiffs failed to allege what misrepresentations or omissions were made).

Relying on *Van Dyke*, the Seventh Circuit affirmed the dismissal of a civil RICO action alleging mail fraud. Holding that "a scheme must involve some sort of fraudulent misrepresentations or omissions," the Seventh Circuit found that the defendant's conduct did not amount to a fraudulent scheme to increase the amount of its trustee's and attorneys' fees since its conduct "did not involve any fraudulent misrepresentations or omissions." *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 646, 649 (7th Cir. 1986). *See also United States v. Hathaway*, 798 F.2d 902, 912 (6th Cir. 1986) (approving jury instruction which

states that the jury must find a scheme to defraud "by means of false and fraudulent pretenses, representations and promises").

A careful reading of the case law cited by the Third Circuit in support of its strained conclusion reveals that, in point of fact, every scheme to defraud charged by the government included, as an integral part of the scheme, an element of misrepresentation. In *United States v. Clapps*, 732 F.2d 1148 (3rd Cir.) *cert. denied*, 469 U.S. 1085 (1984), for instance, the prosecution hinged on evidence of false representations. Defendants who perpetrated the voter fraud scheme at issue there falsified absentee ballots, falsely representing that residents of a rest home had cast the ballots which, in reality, the voters had never seen or mailed. 732 F.2d at 1150, 1153. False representations were likewise central to the government's allegations in the two other cases cited by the court below: *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) and *United States v. Halbert*, 640 F.2d 1000 (9th Cir. 1981)[7].

The Court below further relied on dictum from its earlier decision in *United States v. Frankel* in which, reaching an issue which had been neither briefed nor argued by the parties, the Third Circuit concluded that "schemes to defraud come within the scope of the [mail fraud] statute even absent a false representation." 721 F.2d 917, 921 (3d. Cir. 1983). A close reading of the cases on which *Frankel* relies, each of which predates *Williams* and none of which alleged a check-kiting scheme, reveals that the language upon which the *Frankel* dictum rests is in turn dictum and that either a false representation or a deceitful omission was central to the charges against the defendants.[8]

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7. In *Margiotta*, the government charged that a fraudulent scheme to distribute municipal insurance commissions was fostered through the preparation of fictitious property inspection reports and was disguised by the defendant's false testimony to state investigators. 688 F.2d. at 114. In *Halbert*, the government charged a fraudulent scheme to market items commemorating the nation's Bicentennial, alleging and proving "*six* acts of misrepresentation." 640 F.2d at 1008. (Emphasis added)

8. *Frankel* purports to find support for its conclusion that a scheme need not include a false representation or omission in case law from other circuits as well as Third Circuit precedent. *See* 721 F.2d at 920-21. Close scrutiny of the cases from other circuits cited there does not bear this out. *See, e.g. United*

The difficulty experienced by the circuit courts in coming to grips with the meaning of the "scheme to defraud" phrase is readily understood. Although the "scheme to defraud" language dates back to the original 1872 version of the mail fraud act, the phrase is neither defined by the mail fraud or wire fraud statutes nor by their "notably sparse" legislative history. S. Arkin, E. Dudley, E. Eisenstein, J. Rakoff, D. Re & J. Siffert, *Business Crime*, ¶32.03[1] at 32-29, 32-33 (1984). To fill this conceptual void, numerous commentators have analogized the mail fraud

NOTES *(Continued)*

States v. Townley, 665 F.2d 579, 584 (5th Cir.), *cert. denied*, 456 U.S. 1010 (1982)(government witnesses testified that defendants had represented that their company had placed patented purified water bottling machines in operation throughout Texas; in reality, defendants "had no patents, no machines and had not been in the business of supplying bottled drinking water to anyone"); *United States v. Bohonus*, 628 F.2d 1167, 1169 (9th Cir.), *cert. denied*, 447 U.S. 928 (1980) (defendant sent letter falsely threatening to terminate insurance program, and failed to disclose to his employer the receipt of kickbacks); *United States v. Isaacs*, 493 F.2d 1124, 1151-52 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (scheme to defraud included an application falsely listing beneficial stock ownership); *United States v. Bruce*, 488 F.2d 1224, 1226-27, 1229 (5th Cir. 1973), *cert. denied*, 419 U.S. 825 (1974) (prospectuses contained a litany of inaccurate statements and made "impossible representations of possible wealth to potential investors"); *Fournier v. United States*, 58 F.2d 3, 5 (7th Cir.) *cert. denied*, 286 U.S. 565 (1932) (defendant stock broker falsely represented that the corporate stock he was promoting was full of promise; if a customer failed to meet a subsequent call for margin, defendant falsely represented that the stock was sold when, in fact, the sale was "fictitious"); *United States v. Scott*, 701 F.2d 1340, 1342 (11th Cir.), *cert. denied*, 464 U.S. 586 (1983) (defendant supplied false information regarding his income, employment and address on loan application); *United States v. States*, 488 F.2d 761 (5th Cir. 1973), *cert. denied*, 417 U.S. 909 (1974)(defendants submitted false voter registration affidavits).

The Third Circuit precedent on which *Frankel* relies is equally unpersuasive. Contrary to the majority's suggestion in *Frankel*, 721 F.2d at 920-21, the Third Circuit's decision in *United States v. Boffa*, 688 F.2d 919 (3d Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983), is *not* in agreement with the *Frankel* dictum. On the contrary, the panel in *Boffa*, which "struggled to define the contours of the mail fraud statute," 688 F.2d at 925, observed that 18 U.S.C. §1341:

> has been expansively construed to prohibit *all schemes to defraud by any means of misrepresentation* that in some way involve the use of the postal system. 688 F.2d at 925.

statute to the common law crime of false pretenses. *See Intangible Rights Doctrine*, *supra*, 47 U.Chi.L.Rev. at 573-74; W. LaFave & A. Scott, *Criminal Law* §90 (1972) at 670-71; *Business Crime*, *supra*, ¶32.03[2] at 32-35; *United States v. Pintar*, 630 F.2d 1270, 1280 & n.13 (8th Cir. 1980).

An essential element of the crime of false pretenses is a misrepresentation. LaFave & Scott, *supra* at 655; *United States v. Pintar*, 630 F.2d at 1280 & n. 13. *See also* J. Rakoff, *The Federal Mail Fraud Statute*, 18 Duquesne L. Rev. 771, 805 & n. 142 (1980) (noting that the verb "to defraud" is rarely used outside the context of wrongdoing by misrepresentation). Because the indictment fails to allege a fraudulent misrepresentation or omission, Rafsky's conviction must be reversed. The government has alleged no misrepresentation or deceitful omission other than the depositing of overdrawn checks in the Provident account. (App. A-11 through A-33). Under *Williams*, the presentation of a check is not a representation or statement of any kind. The drawer of a check makes no warranty — express or implied — as to the amount of money currently on deposit in his account or as to the availability of funds to cover the face value of the check. 458 U.S. at 285. Accordingly, the element of false representation is missing from the "scheme or artifice to defraud" as set forth in the indictment.

Nor are United States v. Kram, 247 F.2d 830 (3d Cir. 1957), or *Kauffman v. United States*, 282 F. 776 (3d Cir.) *cert. denied*, 260 U.S. 735 (1922), dispositive. The key language for which each case is cited by *Frankel* rests in both cases on a misinterpretation of this Court's precedent, *Durland v. United States*, 161 U.S. 306 (1896). *Durland* stands for the proposition that a scheme or artifice to defraud may be premised not only on a misrepresentation of an existing fact but also on a false promise as to the future. *See Durland*, *supra*, 161 U.S. at 313 ("any scheme or artifice to defraud must be read to include everything designed to defraud by representations as to the past or present or suggestions and promises as to the future"). *See also* Comment, *The Intangible Rights Doctrine and Political Corruption Prosecutions Under the Federal Mail Fraud Statute*, 47 U.Chi.L.Rev. 562, 570-571(1980) (*Durland* extended "scheme to defraud" to include false promises). To interpret *Durland*, which expanded the concept of fraudulent misrepresentation to encompass false promises, as having abrogated the misrepresentation requirement altogether is a grave misreading of this Court's precedent.

It is likewise agreed that the "essential underlying component [of the mail and wire fraud statutes] is that of intentional deception." *Business Crime*, *supra*, ¶32.03[2] at 32-35; *Intangible Rights Doctrine*, *supra*, 47 U.Chi.L.Rev. at 573; J. Rakoff, *The Federal Mail Fraud Statute*, 18 Duquesne L. Rev. 771, 805 (1980). The gist of deceit is "fraudulently producing a false impression upon the mind of another person." 37 Am. Jur. 2d, *Fraud and Deceit* §20 at 44. Under *Williams*, there can be no proof of deceit based on the deposit of overdrawn checks. A check is without guile; it makes no warranty as to the availability of funds to cover its face value. It cannot produce a "false impression" because it is neither true nor false. *Williams*, *supra*, 458 U.S. at 284. Accordingly, the judgment of conviction entered below cannot stand.

CONCLUSION

For the foregoing reasons, this Court should grant a Writ of Certiorari to review the two issues presented by this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert N. de Luca, hereby certify that on December 12, 1986, three copies each of this Petition for a Writ of Certiorari were served by first-class mail pursuant to Supreme Court Rule 28.4 as follows:

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I further certify that all parties required to be served have been served.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-1243

UNITED STATES OF AMERICA

v.

JEFFREY K. RAFSKY

Appellant

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

Criminal No. 85-00303-01

Argued September 16, 1986

Before: ADAMS, STAPLETON and GARTH,
Circuit Judges

(Filed October 14, 1986)

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OPINION OF THE COURT

ADAMS, *Circuit Judge*.

In February 1986, Jeffrey Rafsky was convicted by a jury of 25 counts of wire fraud in connection with a check kiting scheme. He was sentenced to three years' probation and community service, and ordered to pay a $1,000 fine; in addition, he was directed to complete restitution to the bank that was defrauded by the end of the probationary period. Rafsky now appeals, claiming that a scheme to defraud based on passing checks backed by insufficient funds cannot, as a matter of law, form the basis of a wire fraud conviction.

I.

As president and 30% owner of Trend Group, a holding company that maintained a checking account at Citizens Fidelity Bank and Trust Company in Louisville, Kentucky, Rafsky engaged in an elaborate check kiting scheme during late 1983 and early 1984. Trend Group was the sole owner of Lease Trend Company, an automobile leasing company, which maintained a checking account at the Provident National Bank in Philadelphia.

In September, 1983, the Trend Group began to experience financial difficulties, largely because of the failure of an Arab sheik to pay a substantial debt to Lease Trend. As a result, Lease Trend's payments on a $4,000,000 line of credit at Provident were delinquent. To meet the financial pressures faced by Trend Group and Lease Trend, Rafsky devised a scheme to take advantage of the "float" between the checking accounts in Philadelphia and Louisville.

Lease Trend had an agreement with Provident that gave Lease Trend immediate credit for deposits made to the Lease Trend account, at Provident, before the deposited check had actually cleared the Federal Reserve System. Taking advantage of this arrangement to create an artificially high balance in the Lease Trend account, Rafsky would write checks drawn on

Trend Group's Louisville bank and deposit them in the Philadelphia bank, which would then immediately credit Lease Trend's account. The Louisville checks, however, were not backed by sufficient funds. In order to cover the amount drawn on the Louisville account, Rafsky would then transfer money by wire from Philadelphia to Louisville, drawing on the artificially high Philadelphia balance.

In February 1984, Provident investigators noticed that LeaseTrend's average daily balance was unusually high, and that this high balance was due to checks drawn on the Louisville account. As a result of the investigation, Provident suspended Lease Trend's wire transfer privileges. The Louisville checks were then processed without the benefit of a wire transfer to cover the checks, and were returned to Provident for lack of sufficient funds. As a result, it was revealed that Lease Trend was overdrawn by some $2,815,000.

In August 1985, Rafsky and William Klein, Vice President of Finance of Trend Group, were indicted in the Eastern District of Pennsylvania on 32 counts of wire fraud in connection with this scheme. The district court granted Klein's severance motion on January 10, 1986. After the district court entered a judgment of acquittal on counts 1 through 7 of the indictment, the jury convicted Rafsky of 25 counts of wire fraud. By the time of trial, Rafsky had reducted his debt to the Provident Bank to approximately $1,000,000.

II.

Both at trial and on appeal, Rafsky has contended that a check kiting scheme cannot be a federal crime under the mail fraud statute, which prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . that involves use of wire, television or radio communications." 18 U.S.C. § 1343. In support of his contention, Rafsky relies on the 1982 Supreme Court case *Williams v. United States*, 458 U.S. 279, and *Williams*'s progeny in this Circuit. *United States v. Frankel*, 721 F.2d 917 (3d Cir. 1983). We believe that this argument is untenable.

In *Williams v. United States*, the Supreme Court held that a check is not a "representation" or "factual statement" for purposes of 18 U.S.C. § 1014, which prohibits "any false statement or report" knowingly designed to influence a federally insured bank in making loans or other financial commitments. In his opinion for the Court, Justice Blackmun stressed that if merely passing a single bad check could form the basis of a federal prosecution, then "a surprisingly broad range of unremarkable conduct [would be] a violation of federal law." 458 U.S. at 286. Congress did not intend to include such a "broad range" of minor infractions within the sweep of a federal criminal statute. "Absent support in the legislative history for the proposition that § 1014 was 'designed to have general application' to the passing of worthless checks, . . . we are not prepared to hold petitioner's conduct proscribed by that statute." *Id.* at 287 (citation omitted).

The Supreme Court was careful, however, to distinguish between a single check backed by insufficient funds and a scheme to defraud involving passage of a series of bad checks. In reversing a conviction based on a single bad check, the Court stated:

> Under the Court of Appeals' approach, the violation of § 1014 is not the *scheme* to pass a number of bad checks: it is the presentation of one false statement — that is, one check that at the moment of deposit is not supported by sufficient funds — to a federally insured bank.

458 U.S. at 286-87. *Williams* thus draws a qualitative distinction between an individual bad check and a "scheme to pass a number of bad checks," *id.*, implying that a deliberate plan to deceive through submitting checks backed by insufficient funds is not the same sort of crime as merely passing a single bad check.[1]

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1. Congress recently enacted a federal bank fraud statute that supplements § 1014, which merely prohibits "misrepresentations or false statements." The new provision, Section 1344, specifically provides for prosecution of a "scheme to defraud" as well as for misrepresentations and false statements:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice—

Applying the rationale of *Williams*, this Court in *United States v. Frankel*, 721 F.2d 917 (3d Cir. 1983), upheld a district court's dismissal of an indictment for mail fraud based on the implied representation made in passing a check written against insufficient funds. Although the mail fraud statute was not involved in *Williams*, the Court held that "[t]he Supreme Court's holding — that the presentation of a check is not a representation or statement of any kind — is fatal to the government's theory here." 721 F.2d at 919. Further, the Court emphasized that "the same principles apply to the wire fraud violation." *Id.* at 921. *See also United States v. Tarnapol*, 561 F.2d 466, 475 (3d Cir. 1977) (mail and wire fraud statutes are construed identically, and cases applying mail fraud statute are also applicable to wire fraud prosecutions). Thus the analysis in *Frankel* also applies to this wire fraud conviction for check kiting.

However, the indictment in *Frankel* was dismissed not because all check kiting schemes are immune from federal prosecution, but because the indictment there rested on a charge of misrepresentation, rather than on a scheme to defraud involving check kiting. The mail and wire fraud statutes prohibit schemes and artifices both to defraud and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. In his opinion for this Court, Judge Weis emphasized that the mail fraud statute must be read in the disjunctive. In other words, a "scheme to defraud" need not be executed by "means of misrepresentations," although it certainly does not exclude misrepresentations. This disjunctive analysis of the clauses of the mail and wire fraud statutes has been applied in subsequent decisions of this Court, and

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(1) to defraud a federally chartered or insured financial institution, or (2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured financial institution by means of false or fraudulent pretenses, representations, or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both. 18 U.S.C. § 1344.

Thus a check-kiting scheme such as the one involved here may well be punishable under § 1344, as well as under the mail and wire fraud statutes.

is favored by other circuits as well. *See, e.g., United States v. Clapps*, 732 F.2d 1148, 1152 (3d Cir. 1984); *United States v. Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United States v. Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981).

Clearly, then, a scheme to defraud based on a check kiting scheme is distinguishable from a misrepresentation involving a single check drawn on insufficient funds. In *Frankel*, as in *Williams*, the government argued that merely passing bad checks is a misrepresentation within the meaning of the statute; in both cases this argument was rejected as beyond the scope of the statutes in question. But a careful reading of both *Williams* and *Frankel* reveals that a scheme to defraud that involves a check kiting arrangement was never held to be outside the prohibitions of the statutes. In fact, both cases distinguish between schemes based on passing bad checks, and the misrepresentation charged by the government.

The ineluctable implication of *Williams* and *Frankel* is that a check kiting scheme is in fact punishable under the mail and wire fraud statutes. This conclusion is clearly in line with the decisions in other circuits.[2] In *United States v. Freitag*, 768 F.2d

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2. In *United States v. Carlisle*, 693 F.2d 322 (4th Cir. 1982), the Fourth Circuit, reversing a conviction under § 1014, held that *Williams* precludes prosecution of "check-kiting" under that statute. The defendant in *Carlisle* had deposited two bad checks, and had attempted to obtain a loan to cover the checks. Labelling this conduct a check-kiting scheme, the court concluded that such conduct was not prohibited by § 1014. While we are in some doubt as to whether *Williams* did indeed hold that check kiting rather than the mere deposit of an individual bad check is not punishable under § 1014, we need only note here that § 1014 prohibits only fraudulent misrepresentations. Since § 1014 does not also contain a clause that prescribes "schemes to defraud," as do the mail and wire fraud statutes, *Carlisle* is not on point for this case. As this Court held in *Frankel*, 721 F.2d at 919, *Williams* clearly applies to the misrepresentation clause of the mail and wire fraud statutes, but does not preclude prosecution under the "scheme to defraud" clause. Indeed, as noted above, the *Williams* Court itself clearly distinguished between schemes and misrepresentations, 458 U.S. at 286-87.

240 (8th Cir. 1985), for example, the Eighth Circuit gave short shrift to an argument similar to Rafsky's here. Upholding a mail fraud conviction for check kiting, the court stated:

> [T]he defendant argues that our holding today will mean that all arguably fraudulent activity conducted with checks will fall within the ambit of § 1341. We reiterate that in order to obtain a conviction under § 1341, the government must prove beyond a reasonable doubt that the defendant intentionally devised a fraudulent scheme and caused the use of the mails for the purpose of carrying out the scheme. We trust that these requirements will serve as a restraint on whatever tendency the government might have to prosecute anyone who ever bounced a check. On the other hand, where personalized checks are ordered, and monthly bank statements relied on to carry out an elaborate and systematic check-kiting scheme, the mails are being misused for criminal purposes.

768 F.2d at 244-45. *See also United States v. Pick*, 724 F.2d 297 (2d Cir. 1983) (sustaining mail fraud conviction for check kiting scheme).

Indeed, check kiting schemes are, in the words of the *Freitag* court "precisely the wrong which § 1341 addresses, and federal prosecution for such activities is warranted." *United States v. Freitag*, 768 F.2d at 245. Rafsky's conduct falls within the wire fraud statute, and thus was properly the basis for a federal conviction.

III.

For the foregoing reasons, the judgment of the district court will be affirmed.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1243

UNITED STATES OF AMERICA

vs.

JEFFREY K. RAFSKY,

Appellant

(D. C. Crim. No. 85-00303-01)

On Appeal from the United States
District Court for the
Eastern District of Pennsylvania

Present: ADAMS, STAPELTON and GARTH, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel September 16, 1986.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered April 11, 1986 be, and the same is hereby affirmed.

ATTEST:

SALLY MRVOS

Clerk

October 14, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**Criminal No. 85-00303-01**
v.	:	**Date Filed: August 14, 1985**
JEFFREY K. RAFSKY	:	**Violations: 18 U.S.C. § 1343**
WILLIAM H. KLEIN		**(Wire Fraud — 32 Counts)**

INDICTMENT

COUNT ONE

THE GRAND JURY CHARGES THAT:

1. At all times material to this Indictment the Provident National Bank (hereinafter "Provident"), Philadelphia, Pennsylvania and the Citizens Fidelity Bank and Trust Company (hereinafter "Citizens"), Louisville, Kentucky were lawfully operating banks whose deposits were insured by the Federal Deposit Insurance Corporation.

2. At all times material to this Indictment, the defendant, JEFFREY RAFSKY, was the Chairman of the Board of Trend Group, Ltd., an international diversified financial services organization.

3. At all times material to this Indictment, the defendant, WILLIAM KLEIN, was the Vice President of Finance of Trend Group, Ltd.

4. At all times material to this Indictment the Lease Trend Company was a subsidiary of Trend Group, Ltd., involved primarily in the business of leasing automobiles.

5. At all times material to this Indictment the Lease Trend Company maintained checking account #594-976-9 at the Provident.

6. At all times material to this Indictment the Trend Group, Ltd. maintained checking account #9526-7018 with Citizens.

7. From in or about October, 1983 through in or about March, 1984, at Philadelphia and elsewhere in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

and other persons known and unknown to the grand jury, did devise and intend to devise a scheme and artifice to defraud the Provident National Bank, which scheme and artifice to defraud is more fully set forth as follows:

8. It was a part of the scheme and artifice to defraud that the defendants JEFFREY RAFSKY and WILLIAM KLEIN would and did take advantage of the Provident's policy of permitting use of the proceeds of deposited items before those items actually cleared.

9. It was a further part of the scheme and artifice to defraud that the defendants JEFFREY RAFSKY and WILLIAM KLEIN would and did select the Provident and Citizens banks based, in part, on the time required for checks circulating between each of those banks to be paid (float time).

10. It was further a part of the scheme and artifice to defraud that defendants JEFFREY RAFSKY and WILLIAM KLEIN would and did cause checks to be written on the Trend Group, Ltd. account #9526-7018 at Citizens well knowing at the time that there were insufficient funds in the account to honor the checks if presented for payment.

11. It was a further part of the scheme and artifice to defraud that the defendants JEFFREY RAFSKY and WILLIAM KLEIN would and did withdraw and spend for other purposes money taken from the float, causing Provident to permit the withdrawal of approximately $2,800,000.00 in funds which, when Provident sought to collect on the underlying deposited items, were not collectable because there were insufficient funds in the Citizens account, causing a loss to Provident of approximately $2,800,000.00

12. On or about October 7, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and

WILLIAM KLEIN, did cause $145,000 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about November 2, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $4,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about December 6, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $27,500.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about December 7, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $100,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about December 9, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $35,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about December 14, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals,

pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $130,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about December 15, 1983, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $125,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 4, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $120,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 12, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $200,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 13, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $200,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 16, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $485,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 18, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $350,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 20, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $260,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT FOURTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 24, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $290,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT FIFTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 27, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $625,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SIXTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about January 31, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $480,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT SEVENTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 1, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,100,152.19 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT EIGHTEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 2, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $375,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT NINETEEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 3, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,035,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 6, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $800,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 7, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $950,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 9, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $500,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-THREE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 10, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,050,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-FOUR

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 13, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $40,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-FIVE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 14, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,050,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-SIX

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 15, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $75,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-SEVEN

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 16, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals,

pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $210,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-EIGHT

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 17, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,400,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT TWENTY-NINE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 21, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $980,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT THIRTY

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 22, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire

communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $995,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT THIRTY-ONE

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 23, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,100,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

COUNT THIRTY-TWO

THE GRAND JURY FURTHER CHARGES THAT:

1. All of the allegations contained in paragraphs one through eleven of Count One are realleged and incorporated by reference herein.

2. On or about February 24, 1984, in the Eastern District of Pennsylvania, the defendants

JEFFREY RAFSKY and
WILLIAM KLEIN

having devised a scheme and artifice to defraud, and for the purpose of executing and attempting to execute the same, did knowingly and willfully cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds, in that defendants, JEFFREY RAFSKY and WILLIAM KLEIN, did cause $1,200,000.00 to be sent in interstate commerce from Provident National Bank in Philadelphia, Pennsylvania to the account of the Trend Group, Ltd. at the Citizens Fidelity Bank and Trust Company in Louisville, Kentucky.

In violation of Title 18, United States Code, Sections 1343 and 2.

A TRUE BILL:

_____

FOREPERSON

_____

EDWARD S.G. DENNIS, JR.
United States Attorney

No. 86-1063

In the Supreme Court of the United States

OCTOBER TERM, 1986

JEFFREY K. RAFSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-1063

JEFFREY K. RAFSKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that his check kiting scheme was not within the reach of the wire fraud statute, 18 U.S.C. 1343.

1. After a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on 25 counts of wire fraud in connection with a check kiting scheme, in violation of 18 U.S.C. 1343. He was sentenced to three years' probation and a $1,000 fine. In addition, he was ordered to make restitution to the defrauded bank. The court of appeals affirmed (Pet. App. A1-A7).

a. The evidence at trial is summarized in the opinion of the court of appeals (Pet. App. A2-A3). It showed that, as president and 30 percent owner of a holding company, Trend Group, petitioner engaged in an elaborate check kiting scheme during late 1983 and early 1984.

Trend Group was the sole owner of Lease Trend Company, an automobile leasing company. Trend Group maintained a checking account at Citizens Fidelity Bank and Trust Company in Louisville, Kentucky, and Lease Trend had a checking account at the Provident National Bank in Philadelphia. In September 1983, Trend Group experienced financial difficulties, largely because of the failure of an Arab sheik to pay a substantial debt to Lease Trend. As a result, Lease Trend's payments on a $4,000,000 line of credit at Provident became delinquent. To meet the financial pressures faced by Trend Group and Lease Trend, petitioner devised a scheme to take advantage of the "float" between the checking accounts in Philadelphia and Louisville. Lease Trend had an agreement with Provident that gave Lease Trend immediate credit for checks deposited to its account, before the checks actually cleared the Federal Reserve System. Taking advantage of this arrangement to create an artificially high balance in the Lease Trend account, petitioner would write checks drawn on Trend Group's Louisville bank and deposit them in the Philadelphia bank, which would then immediately credit Lease Trend's account. The Louisville checks, however, were not backed by sufficient funds. In order to cover the amount drawn on the Louisville account, petitioner would then transfer money by wire from Philadelphia to Louisville, drawing on the artificially high Philadelphia balance.

In February 1984, Provident investigators noticed that Lease Trend's average daily balance was unusually high, and that this high balance was due to checks drawn on the Louisville account. As a result of the investigation, Provident suspended Lease Trend's wire transfer privileges. The Louisville checks were then processed without the benefit of a wire transfer to cover the checks, and were returned to Provident for lack of sufficient funds. As a result, it was revealed that Lease Trend's account was overdrawn by some $2,815,000.

b. Petitioner appealed his jury conviction, and the court of appeals affirmed (Pet. App. A1-A7). It devoted its opinion to rejecting petitioner's contention that *Williams* v. *United States*, 458 U.S. 279 (1982), barred petitioner's conviction under 18 U.S.C. 1343 for his check kiting scheme.

2. Petitioner now renews his claim that *Williams* precludes his prosecution under Section 1343, and that the Third Circuit's opinion to the contrary conflicts with decisions in the Sixth and Seventh Circuits. These claims are meritless, and further review is not warranted.[1]

a. In *Williams*, the defendant was convicted of violating 18 U.S.C. 1014 by knowingly depositing a check that was supported by insufficient funds. That statute prohibits "any false statement or report" knowingly designed to influence a federally insured bank in making loans or other financial commitments. In reversing the conviction, this Court held that a check is not a "false statement" within the meaning of Section 1014. The Court stressed that if merely writing a worthless check could form the basis for a prosecution under Section 1014, then a "surprisingly broad range of unremarkable conduct [would be] a violation of federal law." 458 U.S. at 286.

In this case, petitioner was charged not with making a "false statement or report" in violation of Section 1014, but with violating 18 U.S.C. 1343. That statute prohibits the use of a "wire, radio, or television communication" in furtherance of "any scheme or artifice to defraud, *or* for obtaining

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[1]We note at the outset that petitioner's claim that there was no evidence of a violation of Section 1343 in this case aside from his series of bad checks—which the court of appeals apparently assumed arguendo to be true—is wrong. Petitioner lied twice, for example, to Provident officials regarding Lease Trend's account activity (C.A. App. 503a, 523a-525a); he also lied to his controller (*id.* at 343a-345a, 355a). See also Gov't C.A. Br. 11-20.

money or property by means of false or fraudulent pretenses, representations, or promises."

Nothing in *Williams* limits the "scheme or artifice" clause or suggests that it is inapplicable to check kiting. Indeed, there is ample evidence in *Williams* to the contrary. The Court there expressly noted that "the violation [that had been found] of § 1014 is not the *scheme* to pass a number of bad checks; it is the presentation of one false statement—that is, one check that at the moment of deposit is not supported by sufficient funds—to a federally insured bank." 458 U.S. at 286-287 (emphasis in original). Thus, as the court below observed, *Williams* "draws a qualitative distinction between an individual bad check and a 'scheme to pass a number of bad checks,' " thereby "implying that a deliberate plan to deceive through submitting checks backed by insufficient funds is not the same sort of crime as merely passing a single bad check" (Pet. App. A4 (footnote omitted)). Similarly, the Court in *Williams* was concerned only that "any check, knowingly supported by insufficient funds, deposited in a federally insured bank could give rise to criminal liability, *whether or not the drawer had an intent to defraud.*" 458 U.S. at 286 (emphasis added).[2]

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[2]The judge's instructions to the jury in the present case specifically focused the jury's attention on the need to find a scheme to defraud, "calculated to obtain something of value through deception"; the instructions also made clear that, as the *Williams* court held, a check is not in itself a false statement (C.A. App. 930a):

> You may not, for example, rely solely upon evidence that checks not supported by sufficient funds were presented to a bank, to conclude that the defendant engaged in a scheme to defraud. Moreover, a check by itself is simply a direction to a bank to pay funds. A check is not a factual assertion, and cannot itself be found to be deceptive or characterized as "true" or "false." You need not find [that] the defendant made any particular representation or false statement at all, however, in order to find that the scheme taken as a whole was calculated to obtain something of value through deception.

Petitioner contends (Pet. 6-12) that a scheme to defraud must necessarily involve a misrepresentation of some sort. If petitioner defines "misrepresentation" to mean a statement, act, or omission in furtherance of a scheme to defraud—as he sometimes seems to—then of course he is right and of course the government's evidence regarding his check kiting scheme qualifies. Systematically writing a series of bad checks to take advantage of a credit "float" and creating an overdraft of $2,815,000 involves, under the broad definition, dishonest statements, acts, or omissions.

On the other hand, if petitioner means to say that one can defraud only through an explicit false statement, then his contention has no basis in the statute, the cases, or common sense. Section 1343 (and the almost identically worded 18 U.S.C. 1341, concerning mail fraud) prohibits in the disjunctive schemes to defraud and schemes "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." See, *e.g.*, *United States* v. *Scott*, 701 F.2d 1340, 1343-1344 (11th Cir.), cert. denied, 464 U.S. 856 (1983); *United States* v. *Margiotta*, 688 F.2d 108, 121 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Halbert*, 640 F.2d 1000, 1007 (9th Cir. 1981). As the court of appeals in *Halbert* stated, "A defendant's activities can be a scheme or artifice to defraud whether or not any specific misrepresentations are involved." 640 F.2d at 1007 (citations omitted). It is untenable to say that one can defraud only by overt lying and not by actions, half-truths, omissions, and innuendo, and there is no support for such a proposition under Section 1343. See *United States* v. *Frankel*, 721 F.2d 917, 919-920 (3d Cir. 1983); *United States* v. *Townley*, 665 F.2d 579, 585 (5th Cir.), cert. denied, 456 U.S. 1010 (1982); *United States* v. *Bohonus*, 628 F.2d 1167, 1172 (9th Cir.), cert. denied, 447 U.S. 928 (1980); *United States* v. *Bruce*, 488 F.2d 1224, 1229 (5th Cir. 1973), cert. denied, 419 U.S. 825 (1974).

b. Petitioner is not aided by the Sixth and Seventh Circuit decisions he cites (Pet. 7-12) for the proposition that a scheme to defraud must involve "misrepresentations or omissions." Once again, a broad definition of "misrepresentations or omissions" would not reverse his conviction, and a narrow definition is inconsistent with the broad language of the statute. In the cited cases, the courts had no need to address situations where the fraudulent scheme might be implemented by means other than an explicit lie. The references in the cited cases therefore cannot be read to suggest a restrictive interpretation of the meaning of "scheme or artifice to defraud." Cf. *United States* v. *Frankel*, 721 F.2d at 919. Moreover, other Sixth and Seventh Circuit decisions clearly indicate that an individual may be convicted under Section 1341 without having made specific misrepresentations or omissions. *United States* v. *Gray*, 790 F.2d 1290, 1294-1295 (6th Cir. 1986), cert. granted on other grounds, No. 86-286 (Dec. 8, 1986); *United States* v. *Keane*, 522 F.2d 534, 545, 551 (7th Cir. 1975), cert. denied, 424 U.S. 976 (1976); *United States* v. *Isaacs*, 493 F.2d 1124, 1149-1151 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *Fournier* v. *United States*, 58 F.2d 3, 5 (7th Cir.), cert. denied, 286 U.S. 565 (1932) (citation omitted) ("It is well settled that to establish [a scheme to defraud] it is not necessary that there should be actual misrepresentation of an existing fact. It is sufficient if the proposed venture be presented in such a way as is calculated to carry out the intent to deceive."). In light of the fact that the statute is worded in the disjunctive, it is not surprising that no court has adopted petitioner's conjunctive reading, and that no court has defined "misrepresentations or omissions" so narrowly as to shield a scheme like petitioner's from prosecution.

c. Finally, we note that, after the commission of the offenses in this case, Congress enacted 18 U.S.C. (Supp. III) 1344, which provides for the prosecution of any person who executes a "scheme * * * to defraud" a bank or to obtain a bank's money "by means of false or fraudulent pretenses, representations, or promises." The legislative history of that statute indicates that one of its purposes was to reach check kiting. S. Rep. 98-225, 98th Cong., 1st Sess. 378 (1983). The use of language in Section 1344 identical to that in Section 1343 to outlaw check kiting bolsters our contention that Section 1343 also encompasses check kiting schemes, where the check kiting is accomplished through the use of interstate wires. In any event, the enactment of Section 1344 significantly limits the importance of the issue presented in this case, since in future cases the government will likely use the new statute—which does not require proof of a mailing or wire transmission—to prosecute check kiters.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

FEBRUARY 1987

(3)

No. 86-1063

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JEFFREY K. RAFSKY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO THE MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE PETITION

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TABLE OF CITATIONS

The government's memorandum fails to counter the compelling reasons why this Court should review this case: the decision below nullifies this Court's decision in *Williams v. United States*, 458 U.S. 279 (1982) and imports an intolerable uncertainty into those statutes which are the cornerstones of the federal government's law enforcement efforts. The government merely parrots the flawed analysis of the Court of Appeals without ever coming to grips with the substance of petitioner's arguments. Specifically, the government's memorandum sidesteps the issues raised by petitioner in four key respects.

1. The government has failed to respond in any meaningful fashion to petitioner's *Williams* argument. As set forth in detail in petitioner's opening brief, this Court in *Williams* concluded that "a check is not a factual assertion at all, and therefore cannot be characterized as 'true' or 'false'." If, as *Williams* holds, the deposit of a worthless check is not a false statement within the meaning of 18 U.S.C. §1014, that same check cannot be considered as "fraudulent" within the meaning of the "scheme to defraud" language of 18 U.S.C. §§1341 and 1343. To hold otherwise would be to permit the jury to characterize a worthless check as "false" if considered in the context of a fraudulent scheme even though *Williams* prohibits the jury from characterizing that same worthless check as "false" in the context of a "false statement" or "misrepresentation." Contrary to the government's assertion, this Court in *Williams* did *not* hold that a check kiting scheme fell beyond the scope of its ruling that a check cannot be characterized as "true" or "false." Accordingly, *Williams* mandates a reversal of the ruling of the court below.

2. The government's analysis of the second issue raised by the Petition, namely whether the Third Circuit erred in holding that a "scheme to defraud" may be executed without either a fraudulent misrepresentation or a deceitful omission, is gravely flawed. The government

fails even to mention, let alone distinguish, the recent case law from the Sixth and Seventh Circuits in which those courts have held, contrary to the Third Circuit, that "a scheme must involve some sort of fraudulent misrepresentations or omissions." *See Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 646, 649 (7th Cir. 1986), *cert. denied*, 107 S.Ct. 579 (1986), and other cases cited at Petition, p. 8. The government is flat wrong in its assertion (Memorandum p. 6) that "in the cited cases, the courts had no need to address situations where the fraudulent scheme might be implemented by means other than an explicit lie." To the contrary, the Seventh Circuit in *Spiegel, supra*, affirmed the dismissal of a civil RICO action alleging mail fraud precisely because there was no lie, explicit or otherwise. As set forth in detail in the Petition, the Seventh Circuit in *Spiegel* found that the defendant's conduct did not give rise to a "scheme to defraud" precisely because its conduct "did not involve any fraudulent misrepresentations or omissions." 790 F.2d at 649.

Instead of confronting the case law on which petitioner relies, the government recommends to this Court a series of cases which the Petition had anticipated and distinguished.[1] In each case, a false representation or a deceitful omission was indeed central to the alleged scheme to defraud. Because there is an irreconcilable

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1. Of the twelve cases cited by the government at pages 5-6 of its memorandum, ten were analyzed in detail and distinguished in the Petition. The two additional cases, *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), *cert. granted on other grounds*, 107 S.Ct. 642 (1986) and *United States v. Keane*, 522 F.2d 534 (7th Cir. 1975), *cert. denied*, 424 U.S. 976 (1976) add nothing to the government's case. In both instances, the indictment hinged on a key deceitful omission. *See United States v. Gray*, 790 F.2d at 1295 (defendant failed to disclose insurance commission kickbacks); *United States v. Keane*, 522 F.2d. at 549 (defendant public official acquired tax delinquent properties without disclosing advance inside information and failed to disclose to his fellow aldermen his interest in matters pending before city council).

conflict between the view of the Third Circuit and that of two of its sister circuits, this Court should grant the Petition and resolve, once and for all, this pivotal and unsettled issue.

3. Contrary to the government's assertion (Memorandum p. 7), the enactment of the new bank fraud statute, 18 U.S.C. §1344, does not trivialize the significance of the issues raised by petitioner.[2] To the contrary, since the language of the new bank fraud statute parallels that of the mail fraud and wire fraud statutes, the uncertainty which presently inheres in the "scheme to defraud" language of Sections 1341 and 1343 is imported wholesale into Section 1344. The same definitional problems which have plagued the circuit courts in the interpretation of the term "scheme to defraud" in the mail fraud and wire fraud statutes will continue to vex them as they confront the identical term in the bank fraud statute. Because, as the government concedes (Memorandum p. 7), "the language [used] in Section 1344 [is] identical to that in Section 1343", the issue of whether the Third Circuit erred in holding that a "scheme to defraud" need not be executed by means of fraudulent misrepresentations or deceitful omissions is thus critical not only to the interpretation of the wire fraud statute under which petitioner was convicted but also to the interpretation of the new bank fraud statute as well.

4. The government resurrects in its memorandum a theory of the case which it articulated for the first time before the Third Circuit but which it neither alleged in

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2. 18 U.S.C. §1344 provides in pertinent part:

(a) Whoever knowingly executes or attempts to execute, a scheme or artifice—

(1) to defraud a federally chartered or insured financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities or other property owned by or under the custody or control of a federally chartered or insured institution by means of false or fraudulent pretenses, representations or promises, shall be fined not more than $10,000, or imprisoned not more than five years, or both.

the indictment nor presented to the jury. The government's assertion (Memorandum p.3, n.1) that the misrepresentation requirement of Section 1343 is satisfied by certain statements allegedly made by petitioner to the Bank and to his controller is a vain attempt to obfuscate the real issues before this Court. The indictment never alleged, and the jury was never asked to consider, whether those statements constituted misrepresentations. As far as the jury was concerned, those statements were without legal significance. They may not now be thrust to the fore to supply the required element of misrepresentation missing from the government's case.

Review by the Court is essential to resolve the untenable ambiguity which now inheres not only in the mail fraud, wire fraud and bank fraud statutes, but in the Racketeer Influenced and Corrupt Organizations Act (RICO), since violations of those underlying substantive statutes serve as predicate acts for criminal prosecution or civil recovery under RICO. Accordingly, the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

/s/ Robert N. de Luca

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Attorneys for Petitioner
Jeffrey K. Rafsky

CERTIFICATE OF SERVICE

I, Robert N. de Luca, hereby certify that on March 17, 1987, three copies each of Petitioner's Reply To The Memorandum For the United States In Opposition To The Petition were served by first-class mail pursuant to Supreme Court Rule 28.4 as follows:

Charles Fried, Esquire
Solicitor General
Department of Justice
10th and Constitution Avenues, N.W.
Washington, DC 20530

Jeffrey W. Whitt, Esquire
Ronald H. Levine, Esquire
Assistant United States Attorneys
United States Attorney's Office
3310 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

I further certify that all parties required to be served have been served.

/s/ Robert N. de Luca

Robert N. de Luca
2600 The Fidelity Building
Philadelphia, PA 19109-1094

Attorney for Petitioner
Jeffrey K. Rafsky